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U Save Foods d/b/a Sun Mart Foods and United Food and Commercial Workers Local No. 7, Petitioner. Case 27–RC–8188

January 30, 2004

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 23, 2002,¹ and the hearing officer's report (relevant portions are attached as an appendix) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 16 for and 19 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings² and recommendations,³ and finds that the election must be set aside and a new election held.

Contrary to our dissenting colleague, we agree with the hearing officer, for the reasons set forth in his report and those set forth below, that the Employer engaged in objectionable conduct by timing the announcement of its decision to remodel its Sun Mart grocery store in order to influence the employees' choice in the election.

I. BACKGROUND

The relevant facts can be summarized as follows. The Employer owns and operates a chain of wholesale distribution centers and retail stores throughout the country. The store at issue is a grocery store that the Employer operates in Sterling, Colorado, known as Sun Mart Foods.

In April, the Employer concluded that in order to compete effectively in the retail market, it needed to remodel several of its retail stores throughout the country. The

Employer's president of retail operations, Michael Mott, was in charge of deciding whether a particular store would be selected for remodeling.⁴ According to Mott's credited testimony, he did not decide to remodel any store until after he had physically visited the premises.

On July 23, 11 days after the petition for representation was filed in this case, Mott visited Sun Mart Foods in Sterling.⁵ After taking a walking tour of the store, Mott determined that Sun Mart Foods would be an excellent candidate for remodeling. He immediately notified Store Manager Dennis Swigart of the decision to remodel. Swigart told other employees, including some unit employees, of the remodeling decision as soon as he learned of it.

Approximately 1 week prior to the August 23 election, Swigart distributed copies of a memo to employees regarding a series of mandatory meetings to take place on August 21. The memo stated that the meetings would be about the upcoming union election and the remodeling.

On August 21, the Employer conducted four mandatory campaign meetings for employees. At the meetings, Bob Baquet, the Employer's regional manager, told employees that the Sun Mart store was one of the "lucky five" in the region chosen for remodeling. Reading from a prepared statement, Baquet expressed the Employer's opposition to the union campaign and encouraged the employees to vote against the Petitioner. Baquet then opened the floor for questions. Most of the questions that employees asked during this question and answer period concerned the upcoming remodeling. Employees wanted greater detail as to how the remodeling effort would benefit them. Employees also expressed concern about the existing cash registers because they were making their jobs more difficult.⁶ During one of the mandatory meetings, Baquet told the employees that the remodeling would include new cash registers.

A second employee concern related to the store's recent loss of customers. The resulting lack of business had caused a decrease in employees' own work hours. At the meetings, Baquet explained that the Employer was also upset about the loss of its Sun Mart customer base and was looking to renovate the store to bring those customers back and increase business.

¹ Hereinafter all dates are in 2002, unless otherwise noted.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

³ Prior to the hearing, the Petitioner withdrew its Objection 1. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that Petitioner's Objections 2 and 3 be overruled.

⁴ The Employer decided that it would remodel approximately 50 of its retail stores.

⁵ Mott was originally scheduled to visit the Sun Mart store in May, but was unable to land at the airport due to inclement weather conditions.

⁶ When the Employer purchased the Sun Mart store about August 2001, it replaced the cash registers with a different brand, which did not print the front of checks. Although the dissent belittles the problem, the record shows that even the Employer acknowledged that the change made the employees' jobs more difficult.

At the election on August 23, 16 ballots were cast for the Petitioner and 19 against. The Petitioner subsequently filed four objections. Objection 4 is the only objection before us for consideration. It reads as follows:

After the union campaign began, the Employer promised to make several improvements throughout the store, including remodeling the store after the election. These improvements were not discussed prior to the union campaign and were made to induce votes against the Union.

The hearing officer recommended sustaining Objection 4. Initially, the hearing officer found that the Employer's decision to remodel the Sun Mart store constituted a benefit to the employees. In addition, the hearing officer found that the Employer's remodeling decision was not made for the purpose of influencing employee free choice in the election.⁷ The announcement of the decision, however, the hearing officer found to be "another matter." Given that the remodeling decision was announced just two days before the election, was made in conjunction with an antiunion speech, and that the Employer failed to show that factors other than the pending election prompted the announcement at such a critical time, the hearing officer concluded that the Employer engaged in objectionable conduct by timing the announcement of the remodeling decision on August 21 in order to influence the outcome of the election. We agree with the hearing officer.

II. DISCUSSION

The Board will infer that an announcement or grant of benefits during the critical period is objectionable; however, the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit. *Star, Inc.*, 337 NLRB 962, 963 (2002). The employer may rebut the inference by showing that there was a legitimate business reason for the timing of the announcement or for the grant of the benefit. *Id.* See also *Adams Super Markets Corp.*, 274 NLRB 1334, 1334-1335 (1985); *Oxco Brush Division of Vistron Corp.*, 171 NLRB 512, 513 (1968). In some cases, the employer may be able to successfully rebut the inference with respect to the grant of the benefit, but may fail to show any reason for the timing of the announcement of the benefit other than the pending election. See *Mercy Hospital*

⁷ The hearing officer reasoned that the decision was part of a preexisting plan that predated the filing of the petition and was based on factors related to profitability and retention of market share. No exceptions were filed to the hearing officer's finding that the Employer's remodeling decision was not objectionable.

Mercy, 338 NLRB No. 66, slip op. at 1-2 (2002); *Union Camp Corp.*, 202 NLRB 1023, 1024 (1973).

The hearing officer properly applied the above principles to the facts of this case. He correctly inferred that the announcement of the remodeling decision, which occurred during the critical period, was objectionable. The hearing officer also correctly found that the Employer failed to rebut the inference that the remodeling announcement was made for the purpose of influencing the employees' votes in the election. In sum, we agree with the hearing officer that "the credible evidence" establishes that "the Employer's announcement of the remodeling decision two days before the election and in conjunction with an anti-union speech delivered at four mandatory employee meetings was calculated to interfere with the election."⁸

The dissent does not argue that the hearing officer misapplied Board law. Nor does the dissent dispute the hearing officer's conclusion that the Employer's announcement was calculated to influence the employees' choice in the election. Indeed, the dissent states that it "agree[s] with the hearing officer and my colleagues, for the purposes of this discussion, that the Employer told employees of the remodeling decision in an attempt to influence the employees' votes in the election."

Nevertheless, the dissent concludes that the Employer's announcement was not objectionable. The dissent's conclusion appears to be based on the following three contentions: (1) it is doubtful that the remodeling decision was a benefit to employees; (2) there is an "implicit finding" or "tacit admission" in the majority decision that the Employer's remodeling announcement did not constitute a "promise"; and (3) Section 8(c) grants the Employer the right to time the announcement of the remodeling decision for the purpose of influencing the outcome of the election. As discussed below, there is no merit in any of these contentions.

A. *The Employer's Decision to Remodel the Sun Mart Store Constituted a Benefit to the Employees*

The dissent assumes "for the sake of argument only" that the remodeling of the store was a benefit to employ-

⁸ In its exceptions, the Employer argues, inter alia, that Objection 4 encompasses only the decision to remodel the store, not the announcement of the decision to employees. We disagree. Objection 4 on its face alleges that "the Employer promised to make several improvements throughout the store, including remodeling the store after the election" and, as discussed infra, we find that the Employer's announcement constituted such an objectionable promise. Moreover, even if the announcement issue does not "exactly coincide with the precise wording" of Objection 4, we find that it is "sufficiently related" to the objection to warrant our consideration on the merits. See *Fiber Industries*, 267 NLRB 840 fn. 2 (1983). In addition, the announcement issue was fully litigated at the hearing.

ees. The dissent's reluctance to find that the remodeling is an employee benefit is based on a distinction it draws between improvements that directly benefit only the employees themselves (such as a wage increase), and improvements that directly benefit the Employer and only indirectly benefit the employees (such as the remodeling of a store). According to the dissent, these two situations are "analytically distinguishable": in the former situation "the Employer can implicitly condition, albeit unlawfully, the granting of the benefit on the employees' rejection of the Union"; by contrast, in the second situation, the "employees will get the 'benefit,' the remodeling, regardless of whether they support the Union or the Employer." The implication of the dissent is that cases falling into the second category do not, as a practical matter, involve the granting of a benefit. We disagree.

The distinction the dissent attempts to draw is inconsistent with the Supreme Court's decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408–410 (1964). In that case, the Court of appeals had found that it was not an unfair labor practice for an employer to grant benefits "unconditionally on a permanent basis [without] any implication the benefits would be withdrawn if the workers voted for the union." 375 U.S. at 408 (quoting 304 F.2d 368, 375 (5th Cir. 1962)). The Supreme Court reversed, reasoning as follows:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged. The danger may be diminished if, as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable. [375 U.S. at 409–410. Footnote omitted.]

In light of the Court's decision, the dissent, like the lower court in *Exchange Parts*, is legally incorrect insofar as it maintains that the permanent and unconditional nature of the Employer's decision to remodel the store renders this case "analytically distinguishable" from other grant of benefit cases.

Contrary to the dissent, we find that the record plainly shows that the remodeling of the store did indeed constitute a cognizable benefit to employees. The relevant inquiry is whether the employees reasonably would view the remodeling as a benefit to them. *Comcast Cablevi-*

sion of Philadelphia, L.P., 313 NLRB 220, 250 (1993) (finding that a proposed benefit was not de minimis because employees viewed the benefit as significant). Significantly, the Employer itself presented the remodeling as a benefit to the employees, telling them that the Sun Mart store was one of the "lucky five" in the region to be chosen. In addition, the Employer addressed employees' concerns regarding the store's existing cash registers, indicating that the remodeling would include new cash registers that would make their jobs less difficult. Finally, the remodeling was a benefit to employees by improving their working conditions and giving them a more pleasant work environment. In sum, as Store Manager Swigart testified, employees were excited about the remodeling because of the "prospect of having a nicer facility to come to work to, the prospect of more business, the prospect of more money." For these reasons, we find that the remodeling of the store was a benefit to employees.⁹

B. The Employer's Announcement of Its Remodeling Decision Constituted a "Promise"

The dissent states that there is an "implicit finding" or "tacit admission" in our decision that "there was never any 'promise' to remodel the store as alleged in Objection 4." Our colleague misconstrues our position.

Webster's Dictionary defines "promise," among other things, "as a declaration that one will do or refrain from doing something specified" or "an undertaking however expressed that something will happen or that something will not happen in the future." *Webster's Dictionary* 1815 (3d ed. 1966). Here, by announcing to employees that the Sun Mart store was one of the "lucky five" selected for remodeling, the Employer "declar[ed]" or "expressed" that it would "do something specified" "in the future"—it would renovate the store. Therefore, we find that the Employer's announcement did indeed constitute a "promise" within the plain meaning of that word.¹⁰

⁹ See *Dallas Ceramic Co.*, 219 NLRB 582, 586–587 (1975) (employer announced shortly before Board election, inter alia, the opening of a new warehouse that would alleviate the employees' overcrowded working conditions; Board held that the employer violated Sec. 8(a)(1) by "announcing to employees improvements in benefits and working conditions").

¹⁰ The dissent contends that an "announcement" cannot be a "promise." We disagree. The concepts are overlapping, not mutually exclusive. An "announcement" may or may not be a "promise," depending on what is being announced.

C. Section 8(c) Does not Grant the Employer the Right to Time the Announcement of the Remodeling Decision for the Purpose of Influencing the Outcome of the Election

The dissent's final contention is that under Section 8(c) of the Act the Employer had an absolute right to announce the decision to remodel the store, even if the Employer timed the announcement to influence the employees' votes in the election. This argument is without merit.

Section 8(c) provides that if a statement is not a threat or a promise of benefit, the statement cannot be found to be an unfair labor practice.¹¹ The Board has long maintained that Section 8(c) was intended by Congress to apply only to unfair labor practice cases and is not, by its terms, applicable to representation cases. See, e.g., *Hahn Property Management Corp.*, 263 NLRB 586 (1982); *Rosewood Mfg. Co.*, 263 NLRB 420 (1982); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 fn. 11 (1962).¹² Assuming arguendo, for the purposes of our decision, that Section 8(c) is applicable to the instant representation case, the Employer's announcement of the remodeling decision would still be objectionable. This is so because, as explained below, the announcement constituted a promise of benefit made for the purpose of influencing the employees' votes in the election, and such promises are expressly excluded from the protection of Section 8(c).¹³

Although the Employer intended to remodel several of its stores prior to the advent of the union campaign, the testimony of its own president establishes that it did not make the actual decision to remodel the Sun Mart store until *after* the representation petition was filed. As set forth in section I, above, President Mott testified that he did not decide to remodel any store until he had physically visited the premises. Mott's visit to the Sun Mart

store did not occur until July 23, 11 days after the petition was filed.¹⁴ Mott's decision to remodel the Sun Mart store was made on July 23, the same day that he visited it. However, the Employer did not formally announce the decision at that time. Instead, the Employer allowed almost a full month to elapse before officially communicating the new benefit to its employees.

When the Employer finally decided to make the announcement, it selected as its method of dissemination a series of meetings scheduled just 2 days before the election. The announcement of the benefit at this crucial time on the eve of the election bore no rational relationship to the date the remodeling decision was made. Thus, this was not an announcement made in the normal course of business unrelated to the union campaign. As the hearing officer correctly found, the Employer has shown no business reason or necessity for announcing the benefits at the time and in the manner that it did. While the Employer may have been justified in deciding to remodel the store, we are under no duty to allow that benefit "to be husbanded until right before the election and sprung on the employees in a manner calculated to influence the employees' choice." *NLRB v. Styletek*, 520 F.2d 275, 280 (1st Cir. 1975). Accord: *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984) ("the timing of the announcement of a wage increase may violate Section 8(a)(1), 'even though the employer's initial decision to raise wages was perfectly legitimate.'") (quoting *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 151 (2d Cir. 1981)); *Pedro's Inc. v. NLRB*, 652 F.2d 1005, 1008 fn. 9 (D.C. Cir. 1981) ("[a] violation of the Act may also be found where benefits, although granted for business reasons, are announced 'right before an election and sprung on the employees in a manner calculated to influence the employees' choice'" (quoting *Styletek*, supra).

The three main cases the dissent relies on are inapposite because they do not involve the situation presented here where both the decision to grant the benefit and the announcement thereof were made after the filing of the petition. The employers in *Raley's, Inc. v. NLRB*, 703 F.2d 410 (9th Cir. 1983), *NLRB v. Tommy's Spanish Foods, Inc.*, 463 F.2d 116 (9th Cir. 1972), and *Koronis Parts, Inc.*, 324 NLRB 675 (1997), announced new bene-

¹¹ Sec. 8(c) reads as follows:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

¹² Member Walsh agrees with this precedent and would find Sec. 8(c) inapplicable here.

Chairman Battista disagrees and would find that true and relevant statements in a representation proceeding, which do not contain threats or promises, should be protected by the policy considerations that lie behind Sec. 8(c). See his dissenting opinion in *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (2003). In the instant case, however, Chairman Battista agrees that the remodeling announcement was a promise.

¹³ See *Mercy Hospital Mercy*, 338 NLRB No. 66 (2002) (announcement of grant of benefit during the critical period held violative of Sec. 8(a)(1) and hence not protected by Sec. 8(c)).

¹⁴ However, irrespective of whether the decision would have been made in May (as the dissent suggests) or was made on July 23 (as the facts show), the significant point is that the announcement of the decision was held back until two days before the election.

The dissent claims to find support for its position in *Capitol EMI Music*, 311 NLRB 997, 1012 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994). However, the dissent's reliance on that case is clearly misplaced because the decision to remodel the *Sun Mart* store was not "planned and settled upon before the advent of the union activity." *Id.*

fits during a union campaign, but the new benefits were initiated prior to the union's arrival. See *Raley's*, 703 F.2d at 414 (employees' "insurance benefits were increased automatically as a consequence of an agreement made two years before"); *Tommy's Spanish Foods*, 463 F.2d at 119 ("uncontradicted that the Respondent's initial effort in the matter of increasing insurance predated the Union's appearance on the scene"); *Koronis Parts*, 324 NLRB at 697 (decision to award 10-year service plaques and \$1000 bonuses was made prior to the advent of the union).

In sum, while we agree with our dissenting colleague that the Employer did not delay or husband *the decision to remodel* the Sun Mart store in order to interfere with the election, we conclude, in agreement with the hearing officer, that the Employer husbanded *the announcement* of its decision to remodel the store "until right before the election and sprung [it] on the employees in a manner calculated to influence the employees' choice." *Styletek*, 520 F.2d at 280. It is the announcement of the benefit, not the decision to grant the benefit, that is objectionable in this case.

Accordingly, for all these reasons, we sustain the Petitioner's Objection 4, set aside the election, and direct that a second election be held.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers Local No. 7.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statu-

tory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. January 30, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Introduction

The election at issue here was held on August 23, 2002. The results of the election were 16 votes for the Petitioner, 19 against, with 3 challenged ballots, an insufficient number to affect the results of the election. Thereafter, the Petitioner filed four objections to the election. Only the Petitioner's Objection 4 is at issue here.¹ The Petitioner's Objection 4 alleges that

[a]fter the union campaign began, the Employer promised to make several improvements throughout the store, including remodeling the store after the election. These improvements were not discussed prior to the union campaign and were made to induce votes against the Union.

The hearing officer recommended that Objection 4 be sustained because he found that the *announcement* of the store remodeling—not the decision to remodel (nor, presumably, any "promise" to remodel as alleged in Objection 4)—constituted objectionable conduct that warranted setting

¹ The Petitioner withdrew its Objection 1 prior to the hearing and did not except to the hearing officer's recommendation that its Objections 2 and 3 be overruled.

aside the election. My colleagues adopt the hearing officer's recommendation and set aside the election. I would overrule the Petitioner's Objection 4 and certify the results of the election.

First, I do not agree that the remodeling of the Sterling store is an "employee" benefit. However, assuming *arguendo* that it is, it is so only in the sense that any decision made by management to improve a company's profitability consequentially inures to the benefit of employees. It is not the kind of direct "employee benefit," such as an increase in wages or vacation time, the grant and announcement of which during the critical period will generally be deemed coercive as an attempt to influence employees' votes in the election and therefore be found in violation of the Act.

Second, since the decision to remodel was made based on a companywide remodeling plan adopted long before the union organizing campaign began, and was made in response to increased competition and a loss of customer base, and certainly not to influence employees' votes in an election at this one store, the decision to grant this "benefit" was lawful. Under the strictures of Section 8(c) of the Act, "an employer's true statement about lawfully granted benefits is protected." (See fn. 9 below and accompanying text.) Since the Employer's announcement of the remodeling decision is a "true statement about lawfully granted benefits," the Employer had the right to announce its decision at any time, including during the critical period, without running afoul of Board law.

Facts

In August 2001, Nash Finch, the Employer's parent company, purchased several stores from Sixth Street/U Save Foods, including the Sterling, Colorado store at issue here. Previously, Nash Finch had designated \$40 million for capital improvements to its retail stores. On April 10, 2002,² it hired Michael Mott as its new president of retail operations to carry out the renovation plan. About 50 stores were to be included in the plan. Mott would not include any store in the renovation plan until he had visited the store.

Mott and other individuals involved in the remodeling decisions were scheduled to visit the Sterling store about May 30, before the union campaign began. The visit, however, was postponed because of weather conditions. Mott finally visited the Sterling store on July 23, 11 days after the filing of the election petition that triggered the commencement of the critical period. On the same day, July 23, Mott made the decision to remodel the Sterling

store.³ Also on July 23, Mott informed certain individuals, including Dennis Swigart, the manager of the Sterling store, of that decision. Within a few days of July 23, Swigart had informed employees, including some unit employees, of the decision.

On August 21, 2 days before the election, Robert Baquet, the Employer's regional manager, held four mandatory employee meetings. At each meeting, Baquet informed the employees that the Sterling store was one of the stores chosen for remodeling. At two of the meetings, Baquet also informed employees that new cash registers that had the capacity to print the front of checks would be installed as part of the remodeling.⁴ Baquet then read a prepared text which set out the Employer's opposition to the Petitioner and encouraged employees to vote against it. After Baquet read the prepared text, there was a question and answer period during which employees asked questions, including questions about the remodeling.

Hearing Officer's Report

I. STORE REMODELING AN EMPLOYEE BENEFIT

In his analysis of whether the Employer had engaged in objectionable conduct as set out in Objection 4, the hearing officer first addressed the threshold question of whether the store renovation itself constituted a benefit to the employees. He found that the renovation was such a benefit because the remodeling addressed the employees' concerns about loss of volume and fewer hours. In reaching this conclusion, he relied, *inter alia*, on Swigart's testimony that the purpose of the remodeling was to make the store better, which would result in more sales volume and, therefore, more hours and more money for employees. In finding that the remodeling constituted an employee benefit, the hearing officer also relied on the fact that Baquet had informed some of the employees at the August 21 meetings that as part of the remodeling they would get new cash registers capable of printing the front of checks. The hearing officer found that the new cash registers addressed an employee con-

³ Mott credibly testified that he made the decision to remodel the Sterling store partly because of the store's continued loss of market share due to increased competition, and partly because he had concluded that although the Sterling store was profitable, it was not as profitable as it could be with capital improvements. The projected budget for the remodeling of the Sterling store was approximately \$250,000 to \$325,000.

⁴ When Nash Finch took over the Sterling store, it replaced the existing cash registers that had the capacity to print the front of checks with cash registers that did not have that capacity. This change made the employees' jobs more difficult because it did not permit them to print the front of checks and it was therefore a subject of employee dissatisfaction.

² All dates hereafter refer to 2002, unless otherwise stated.

cern (see fn. 4 above) and were therefore an employee benefit.⁵

II. REMODELING DECISION NOT OBJECTIONABLE

Having found that the renovation was an employee benefit, the hearing officer next considered whether the renovation decision and/or the announcement of the renovation to employees constituted objectionable conduct. Citing *United Airlines Service Corp.*, 290 NLRB 954 (1988), for the proposition that the Board infers that benefits granted during the critical period are coercive, but that an employer may rebut that inference by offering an explanation, other than the pending election, for the timing of the grant or announcement of benefits, the hearing officer inferred that the decision to remodel the Sterling store and its announcement to employees, both of which occurred during the critical period, were coercive.

The hearing officer went on to find, however, that the Employer successfully rebutted the presumption that the remodeling decision was made for the purpose of influencing the employees' votes in the election. In reaching this conclusion, the hearing officer reasoned, in effect, that although circumstances, i.e., Mott's inability to visit the store on May 30, dictated that the decision to remodel the Sterling store was made during the critical period, it was in fact part of a preexisting plan that predated the filing of the election petition, and was based on factors related to profitability and retention of market share, not union activity. Finally, the hearing officer observed that the remodeling decision involved a significant companywide capital investment.

III. ANNOUNCEMENT OF REMODELING DECISION FOUND OBJECTIONABLE

The hearing officer reached a different result, however, as to the *announcement* of the remodeling decision. Quoting *NLRB v. Styletek*, 520 F.2d 275, 280 (1st Cir. 1975) ("[w]age increases and associated benefits may well be warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice"), the hearing officer stated that "[b]oth the Board and the courts have long recognized that an announcement of a benefit can itself be calculated to interfere with an election."

In finding that the Employer's announcement of the remodeling decision was calculated to interfere with the election and was therefore objectionable, the hearing

officer emphasized that the announcement was made 2 days before the election and in conjunction with an anti-union speech. The hearing officer further observed that the Employer had offered no business reason, justification, or need for its timing of the announcement 2 days prior to the election and had not explained why it could not have delayed the announcement until after the election. Finally, although the hearing officer noted that Swigart had informed some unit employees of the remodeling shortly after July 23, and thus well before the election, he found nevertheless that this did not change the result both because the evidence indicated that most unit employees had not heard about the remodeling prior to the August 21 employee meetings and because Swigart's statements to the unit employees about the remodeling also occurred during the critical period. For these reasons, the hearing officer found that the announcement of the remodeling at the August 21 employee meetings constituted objectionable conduct that warranted setting aside the election. I disagree.

Analysis

A. Whether the Remodeling is an Employee Benefit

As a preliminary matter, I accept for the sake of argument only, the hearing officer's finding that the remodeling is an employee benefit. My reluctance to find, on this record, that the remodeling is an *employee* benefit arises from the fact that we are not dealing here with an employee benefit of the type the Board traditionally contemplates in the context of objectionable conduct, i.e., a benefit in the form of an immediate improvement in the employees' wages, hours, or other terms and conditions of employment that inures directly to the advantage of, and is limited to, the employees themselves. Rather, here the Employer is undertaking the remodeling of the Sterling store, the "benefit" at issue, purely for business reasons. It will have no immediate effect on the employees' wages, hours, or other terms and conditions of employment. It is true, of course, that to the extent the remodeling increases the store's customer base and creates more profit for the Employer, the employees will derive a consequential benefit from it in the form of increased job security and at least a potential improvement in their wages and hours. But the fact remains that the direct benefit of the remodeling inures to the Employer, and the Employer alone, not to the employees, and it is this benefit which was the motivating factor for the remodeling decision.

In my view, such a situation is analytically distinguishable from a situation where only employees will receive the benefit. In the former case, because the change, in this case the remodeling, was undertaken to

⁵ For the reasons set out below, I will assume, *arguendo*, that the remodeling of the Sterling store constitutes an employee benefit.

improve the Employer's business, it will go ahead regardless of whether or not the employees support the Union. In the latter case, however, because the change will affect only employees, the Employer can implicitly condition, albeit unlawfully, the granting of the benefit on the employees' rejection of the Union. See, e.g., *Lutheran Retirement Home*, 315 NLRB 103, 103–104 (1994) (emphasis added) (Board found that Anderson's, the employer's chairman of the board, statement to employees made 2 days prior to the election, that the Employer was definitely looking into getting pensions for the employees, constituted an implicit promise of a specific and substantial benefit and was therefore objectionable because "employees would reasonably believe that Anderson was implicitly providing them with a concrete example of a benefit which they could obtain *only* by supporting the decertification effort"). *In the present case, by contrast, the employees will get the "benefit," the remodeling, regardless of whether they support the Union or the Employer.*

I also reject the hearing officer's attempt to exalt the replacement of the cash registers, which itself represents only a very small part of the remodeling at issue, into an employee benefit. I find singularly unpersuasive the hearing officer's apparent finding that employees will be coerced into voting against the Petitioner by the announcement of new cash registers that will print the front of checks.

B. Whether the Announcement of the Remodeling Decision is Objectionable

Assuming *arguendo* only that the business decision to remodel the store is an employee benefit, I now address the issue presented, whether the Employer's announcement of the remodeling is coercive of the employees' right to a free and unfettered vote in the election and is therefore objectionable. For the reasons set out below, I find that it is not.⁶

Initially, I agree with the hearing officer, as do my colleagues, that the Employer's decision to remodel the Sterling store is not objectionable. I also agree with the hearing officer's and my colleagues' implicit finding that there was never any "promise" to remodel the store as alleged in Objection 4, and with their tacit admission that where, as here, an employer has decided to grant benefits to its employees, and the decision to grant the benefits is

itself found to be lawful, the subsequent announcement to employees of that decision cannot constitute objectionable conduct as a "promise" of benefits. Finally, I will agree with the hearing officer and my colleagues, for the purposes of this discussion, that the Employer told employees of the remodeling decision in an attempt to influence the employees' votes in the election. Contrary to the hearing officer and my colleagues, however, I do not find that announcement objectionable under the Act because it contains neither a threat of reprisal nor promise of benefit.

In finding that the Employer's August 21 announcement of the remodeling does not constitute objectionable conduct, I rely on Section 8(c) of the Act, which states:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Although Section 8(c) is technically limited to the unfair labor practice context, I find that its principles are applicable in the context of election objections, as here, because in my view an employer should be free to express its "views, argument, or opinion" during an election campaign so long as those views contain "no threat of reprisal or force or promise of benefit." For if an employer's expression of "views, argument or opinion" made during the critical period preceding an election is free of any threat of reprisal or promise of benefit, that expression cannot be coercive of the employees' freedom of choice in the election, and if it is not coercive, it cannot be objectionable. And this is true regardless of whether or not the employer's statement is timed to influence its employees' vote in the election. Simply put, an Employer's attempt to "influence" its employees in their voting cannot rise to the level of "coercion" when, as here, it is the *timing* of the announcement that is at issue rather than its *content*. To conclude otherwise would be to say that an employer cannot share good news with its employees during the critical period, even though the good news is itself legally unobjectionable, because the news might influence employees to favor the employer in the election. I refuse to reach such a result.

Employees have the right to hear the news—all of it, both the "good" and the "bad"—in considering their votes in an election. That right should not terminate at the commencement of the critical period. Since there is no prohibition against an employer—or a union—from announcing "bad" news during the critical period that disfavors the employer, there should be no prohibition

⁶ For the reasons explained below, and contrary to the majority's apparent argument, I am not basing my finding that the announcement of the remodeling was not objectionable on a finding that the remodeling was not itself an employee benefit. Rather, as explained above and below, in finding that the announcement of the remodeling was not objectionable, I am assuming, *arguendo*, that the remodeling was an employee benefit.

against the announcement of “good” news during the same time period. For it is only by weighing both the “good” news and the “bad” in the critical period preceding the election that employees may gain a better understanding of the positions of the parties and therefore be better able to vote their consciences in the election.

In reaching the contrary conclusion, i.e., that the timing of the announcement of the decision to remodel the Sterling store rendered the announcement objectionable, the hearing officer erred by relying on the language from the First Circuit’s decision in *NLRB v. Styletek*, 520 F.2d at 280, quoted above, to the effect that while *wage increases* and other benefits may be warranted, the Board does not have to permit them to be “husbanded” until just before an election and then “sprung on” the employees in a manner calculated to influence the employees’ votes in the election. The hearing officer erred by relying on *Styletek* because, as the Ninth Circuit pointed out in *Raley’s, Inc. v. NLRB*, 703 F.2d 410 (1983), in *Styletek*, unlike in *Raley’s* and in the present case, the decision to grant the increased wages was intentionally delayed and made during the critical period when it was simultaneously announced to employees.⁷ In such circumstances, an *impermissible* promise or grant of benefits renders its announcement objectionable. This is so because the impermissible promise or grant and its announcement are essentially one and the same.

In *Raley’s*, as here, the facts dictated a different result. In that case, the court was “presented with the bald question [of] whether an employer can violate [S]ection 8(a)(1) by announcing and explaining *lawfully* granted benefits in order to influence an election.” *Id.* at 415. In reversing the Board’s finding of the violation, the court emphasized that the Board found that *Raley’s* did not make the decision to grant the increased insurance benefits at issue in order to influence the impending election

⁷ In *Raley’s*, the court distinguished cases relied on by the Board in support of its assertion that an announcement of benefits purposed to influence an election were unlawful. In distinguishing those cases, the court explained:

[I]n the cases the Board relies on, “announcement” invariably refers to cases where the grant and the announcement occurred together in the preelection [i.e., critical] period. For example, in *NLRB v. Styletek, Division of Pandel-Bradford, Inc.*, 520 F.2d 275 (1st Cir. 1975), the court enforced an order based on violations of [S]ection 8(a)(1) in the announcement of wage increases two weeks before a union election. The court stated that “the Board is under no duty to permit [wage increases and associated benefits] to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees’ choice.” *Id.* at 280. *But there the benefits were granted and announced in a single stroke: the notice of wage benefits stated that the new wages would be reflected in the next pay checks. The Board had no reason in the Styletek case to analyze the announcement and the conferral of benefits separately.*

Id. at 415 (emphasis added).

and that *Raley’s* did not violate Section 8(a)(1) by granting the increased benefits. Thus, the court found that the unfair labor practice finding at issue “was limited to *Raley’s* communicative activities” (i.e., its announcing and explaining of lawfully granted benefits in order to influence the election). *Id.* at 414–415. Following its decision in *NLRB v. Tommy’s Spanish Foods, Inc.*, 463 F.2d 116 (9th Cir. 1972),⁸ in which the court had overturned an unfair labor practice finding “based on the mere communication of increased benefits,” the *Raley’s* court held that “an employer’s true statement about lawfully granted benefits is protected under [S]ection 8(c)” of the Act.⁹ *Id.* at 415. On this basis, the court reversed the Board’s finding of the violation.

Finally, I observe that Board law is not to the contrary. In *Koronis Parts, Inc.*, 324 NLRB 675 (1997), for exam-

⁸ In *Tommy’s Spanish Foods*, the Board found that the employer had violated Sec. 8(a)(1) by advising its employees during the pendency of an election that it had been considering and reviewing its employee insurance program. In finding the violation, the Board concluded that the reference to the proposed insurance benefits was unlawfully designed to influence the employees in the election by promising them future benefits. *Tommy’s Spanish Foods*, 463 F.2d at 118. In reversing, the court concluded, in effect, that an employer can notify its employees during the pendency of an election of efforts in progress to improve the lot of the employees, so long as those efforts predate the advent of the union. In finding that such a communication is protected by Sec. 8(c), the court quoted the following language from the dissent of Chairman Miller in the underlying Board case:

The evidence is undisputed that, about a month before the petition for an election was filed, Respondent’s president had begun to explore the possibility of expanding the employees’ insurance coverage and had contacted two insurance brokers for this purpose. After the petition was filed, she discussed with her employees their present level of benefits and, in doing so, told them that she had been preparing, prior to the advent of the Union, to improve their insurance program. It seems clear to me that Respondent had a perfect right to inform employees of this fact. Just as an employer is free to rehearse for employees the benefits which they have previously received from the employer without a union, in order that they may evaluate the employer’s past performance, so should an employer be permitted to notify employees of efforts in progress to improve the lot of the employees. Since it is uncontradicted that the Respondent’s initial effort in the matter of increasing insurance predated the Union’s appearance on the scene and, accordingly, cannot be characterized as simply a stratagem in response to the threat of unionism, I would find that Respondent’s announcement of the contemplated insurance increase was permitted under Section 8(c). The facts presented in this case do not give rise to the inference of unlawful intent drawn by the Court in *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). *Id.* at 119 (quoting *Tommy’s Spanish Foods*, 187 NLRB 235, 238 (1970) (dissent of Chairman Miller)).

⁹ In holding that “an employer’s true statement about lawfully granted benefits is protected under [S]ection 8(c),” the court also relied on the “rule” in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), that

an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” [*Id.* at 414–415.]

ple, the Board adopted without comment the judge's dismissal of a complaint allegation which alleged that the respondent unlawfully awarded bonuses to each employee with more than 10 years of service in order to discourage employees from supporting the union. During a September 27, 1995 picnic, and only 3 weeks after the September 7, 1995 onset of the union campaign, the respondent awarded 10-year service plaques to six employees and \$1000 bonuses to three of them. Given the facts that the respondent had never awarded plaques and bonuses to employees for length of service, and that the awards were made shortly after the union announced its campaign, the General Counsel argued that the plaques and bonuses had been awarded as a benefit to dissuade employees from supporting the union.

Having found that the respondent had established that it made the plans to award the plaques and bonuses prior to the onset of the union campaign, the judge next considered whether the timing of the bonus awards, within three weeks of the onset of the union campaign, rendered the bonus awards an unlawful benefit. In rejecting this conclusion, the judge observed that "it is settled that, even during a preelection period, an employer may announce benefit improvements which have become concretized as a result of an already initiated and ongoing process." *Id.* at 697.

Having set out my reasons for finding that the remodeling is not an employee benefit, and that, even if it were, its announcement would not be objectionable, I will now respond to the majority's criticism of the dissent.

Response to Majority

The majority asserts that the dissent's conclusion—that the Employer's announcement was not objectionable—"appears" to be based on three contentions: "(1) it is doubtful that the remodeling decision was a benefit to employees; (2) there is an 'implicit finding' or 'tacit admission' in the majority decision that the Employer's remodeling announcement did not constitute a 'promise'; and (3) Section 8(c) grants the Employer the right to time the announcement of the remodeling decision for the purpose of influencing the outcome of the election." I shall address these contentions in turn.

1. The remodeling is not an employee benefit

To reach the issue of whether the announcement of the remodeling decision is permissible, I have assumed, *arguendo*, that it is an employee benefit. But my view, as explained above, is that the remodeling is not an employee benefit. The fact that the benefit here, the remodeling, is being undertaken company-wide to protect and increase the Employer's market share, and, thus, accrues primarily to, and for, the Employer, and not to the em-

ployees, distinguishes the present case from other grant of benefit cases. For regardless of whether the employees choose to be represented by a union or not, the Employer is not going to deny the "benefit" of remodeling to itself. Therefore, my colleagues' reliance on *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), is misplaced. For the remodeling cannot conjure up the image of "a fist inside a velvet glove"¹⁰ as it does in cases where, as in *Exchange Parts*, the benefit at issue, in that case a wage increase, accrues only to employees.

2. Even assuming that the remodeling is a benefit, its announcement to employees does not constitute a promise of benefit

To support their assertion that the announcement of the remodeling constitutes a "promise" of benefit, my colleagues rely on *Webster's Dictionary* and the following definition: a "promise" is, *inter alia*, "a declaration that one will do or refrain from doing something specified," or "an undertaking however expressed that something will happen or that something will not happen in the future." From this definition, they form the following syllogism (emphasis added): (1) a "promise" is "a declaration that one will do or refrain from doing something specified," or "an undertaking however expressed that something will happen or that something will not happen in the future"; (2) "by announcing to employees that the Sterling store was . . . selected for remodeling, the Employer 'declared' or 'expressed' that it would 'do something specified' 'in the future'—it would renovate the store[.]" (3) "[t]herefore . . . the Employer's announcement . . . constitute[s] a 'promise' within the plain meaning of that word." Unfortunately, while my colleagues rely on the dictionary for the definition of the term "promise," they do not rely on it for the definition of the term "announcement." By failing to do so, they are able to formulate their syllogism. But, as explained below, it is a syllogism of convenience, not logic.

I shall begin my analysis where my colleagues left off, with the definition of the term "announcement." *Webster's New Collegiate Dictionary* (1961) 36 defines "announcement" as "a proclamation, public notification, or advertisement." *Webster's Third International Dictionary* (1966) 87 provides the following example of the term's usage: "an [announcement] of marriage." Obviously, "an announcement of marriage" is not the same as a "promise of marriage." In the former example, the

¹⁰ As stated in *Exchange Parts*, 375 U.S. at 409 (footnote omitted): The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

announcement is a “proclamation” or “public notification”; in the latter example, the promise is “a declaration that one will do or refrain from doing something specified” or “an undertaking however expressed that something will happen or that something will not happen in the future.” Clearly, then, the Employer’s *announcement* of the remodeling is not a *promise* to remodel, and my colleagues cannot make it so merely by asserting in step (2) of their syllogism that the Employer’s ‘declaration’ or ‘expression’ that it would renovate the store constitutes a promise to do so. The dictionary defines otherwise. My colleagues’ syllogism fails for want of logic.

Thus, an announcement is not a promise. Since, as explained above, my colleagues do not sustain Objection 4 on the ground that it is a “promise” of benefit, as it is alleged to be, but as the “announcement” of the benefit,¹¹ I adhere to my view that my colleagues “implicitly find” or “tacitly admit” that the announcement is not a promise.

3. The Employer’s announcement protected by Section 8(c)

My colleagues next assert that, even assuming Section 8(c) applies in representation cases,¹² it does not protect the Employer’s announcement because it was timed to influence the employees’ votes in the election. In support of this assertion, my colleagues contend that “[a]lthough the Employer intended to remodel several of its stores prior to the advent of the Union campaign . . . it did not make the actual decision to remodel the [Sterling] Sun Mart store until *after* the representation petition was filed” (emphasis in original). Having implied that the Employer, in effect, husbanded the decision to grant the benefit because it made the decision after the petition was filed, my colleagues then quote *NLRB v. Styletek*, 520 F.2d at 280 (discussed above at fn. 7 and accompanying text), to assert that although “the Employer may have been justified in deciding to remodel the store, we are under no duty to allow that benefit ‘to be husbanded until right before the election and sprung on the employees[.]’” Thus, my colleagues claim, in effect, that the Employer’s announcement of the remodeling decision is objectionable because the Employer made the decision to remodel after the petition was filed.

This argument lacks merit for two reasons. First, as explained above, the hearing officer specifically found

that the decision to remodel the Sterling store was part of a preexisting plan which predated the filing of the election petition and that the decision itself was based on factors relating to profitability and retention of market share, not union activity. And it was on this basis that the hearing officer found that the Employer’s decision to remodel the store, although made during the critical period, *i.e.*, *after the petition was filed*, was not objectionable. Since my colleagues adopt the hearing officer’s finding that the decision was not objectionable, they must necessarily agree that the fact that the decision was made after the petition was filed is without legal significance.¹³ This being so, they cannot now assert otherwise to reach out and find the announcement objectionable. The second reason that my colleagues’ argument lacks merit is that it relies on *NLRB v. Styletek*, a decision which, as explained above at fn. 7 and accompanying text, is inapposite here.

In sum, and contrary to my colleagues’ apparent claim, the Employer did not delay, did not husband, the decision to remodel in order to influence the election. And, therefore, under the logic of *Raley’s, Tommy’s Spanish Foods*, and *Koronis Parts*, discussed above, its subsequent “announcement” does not constitute a “promise” of benefit.¹⁴

¹³ Since my colleagues must agree that the fact that the decision was made after the petition was filed is without legal significance, their contention that *Raley’s, Tommy’s Spanish Foods*, supra, and *Koronis Parts*, supra, are “inapposite” because in those cases, unlike here, the decision was made before the petition was filed, is inherently flawed and without merit. It is also inaccurate. For, as my colleagues themselves point out, the respondent in *Tommy’s Spanish Foods* had only made an “initial effort” in its consideration to expand employees’ insurance coverage, not a final decision, prior to the filing of the election petition in that case (see fn. 8 above, in majority). By contrast, in the present case, the Employer’s decision to remodel had been “concretized” prior to the filing of the petition. Thus, my colleagues’ own argument actually supports a finding that the logic of *Raley’s Tommy’s Spanish Foods*, and *Koronis Parts* applies here and requires a finding that the announcement of the remodeling is not objectionable.

¹⁴ The majority relies on *Mercy Hospital Southwest Hospital*, 338 NLRB No. 66 (2002), as support for its position that even where the grant of benefits is found lawful, the announcement of those benefits can be found unlawful. But the analysis of these issues in *Mercy Hospital* is confusing. For in the underlying decision, the judge found that the decision to grant the wage increase was lawful because “the wage adjustments would ultimately have been made even if no union were on the scene[.]” *Id.* at 4. The judge went on to find, however, that the “effectuation timing” and the “announcement” of the wage adjustment were unlawful. *Id.* at 5. But if the “effectuation timing”, *i.e.*, the actual granting of the benefit, was unlawful because it was influenced by union activity, then, of course, its announcement would also be unlawful. But that is not the case here. Further, in *Capitol EMI Music*, 311 NLRB 997, 1012 (1993) (emphasis added), *enfd. mem.* 23 F.3d 399 (4th Cir. 1994), a case that the Board in *Mercy Hospital* cited with approval, the Board there adopted the judge’s statement that:

The announcement and/or grant of wages or other benefits increases is legally permissible if it can be shown that an employer was following

¹¹ My colleagues also assert that the concepts of “promise” and “announcement” can be “overlapping.” Even if that were true, it is irrelevant because there is no assertion that they overlap here.

¹² As explained above, although Sec. 8(c) is technically limited to the unfair labor practice context, I find that its principles are applicable in the context of election objections as well. I note that Chairman Battista also subscribes to this view.

Finally, since the announcement contains no express or implied promise of benefit, the Employer's right to make the announcement is protected by the principles underlying Section 8(c) of the Act.¹⁵ That right is not infringed, and the announcement is not rendered objectionable, merely because the Employer chose to exercise the right to make the announcement prior to the election.

Conclusion

The Ninth Circuit's analysis in *Raley's*, supra, and *Tommy's Spanish Foods*, supra, as well as the Board's own analysis in *Koronis Parts*, supra, support—indeed, require—a finding that the Employer's announcement of its decision to remodel, a decision which was itself “concretized” prior to the advent of the Union, is protected by the strictures of Section 8(c). Since the content of the announcement of the remodeling contains no promise of benefit, the announcement is not coercive and, therefore, cannot be objectionable. And, as explained above, this is true regardless of whether or not the announcement is timed to influence the election. For these reasons, I would overrule the Petitioner's Objection 4 and certify the results of the election.

Dated, Washington, D.C. January 30, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

Objection No. 4

The Petitioner alleges: “After the union campaign began, the Employer promised to make several improvements throughout the store, including remodeling the store after the election. These improvements were not discussed prior to the union campaign and were made to induce votes against the Union.” I conclude that the Employer's announcement of its decision to remodel the store constituted objectionable conduct which warrants the setting aside of the election.

The evidence shows that on July 23, 2002, during the critical period, the Employer decided that the Sterling store would be one of five in its region to be remodeled. On the same day,

its past practice regarding such increases or *that the increases were planned and settled upon before the advent of union activity*. Since in the present case the remodeling was “planned and settled upon before the advent of union activity,” this statement supports the conclusion that the announcement of the remodeling was not objectionable.

¹⁵ For the reasons set out in Chairman Miller's dissent in *Tommy's Spanish Foods*, 187 NLRB at 238, quoted above at fn. 8, as well as for the reasons set out above at fn. 10 and accompanying text, my colleagues' reliance on *NLRB v. Exchange Parts*, supra, must fail.

Swigart, the Employer's store manager, was informed of the decision. Thereafter, he, in turn, informed some of the employees about the decision.

On August 21, 2002, two days before the election, Robert Baquet, the Employer's regional manager, conducted four mandatory employee meetings at the store. The meetings were conducted at 9 a.m., 12 p.m., 3 p.m. and 7 p.m. At each of these meetings, Baquet read verbatim from a prepared text. His statement clearly expressed the Employer's sentiments against the Petitioner and encouraged the employees to vote against the Petitioner. As a preface to his reading of the prepared statement, at each of the meetings Baquet announced to the employees that the Sterling store was one that the Employer had chosen to remodel. Also at each of the meetings, a question and answer session followed Baquet's reading of the prepared statement. According to Baquet, the remodeling of the store was the subject of a lot of the questions during those sessions.

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *United Airlines Services Corp.*, 290 NLRB 954 (1988). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits, *United Airlines Services Corp.*, supra.

Initially, it must be determined whether the Employer's decision to remodel the Sterling store constituted a benefit to the employees. The Employer contends that it did not. I disagree. The evidence shows that when the Employer purchased the Sterling store in about August 2001 it replaced the cash registers at the checkstands with a different brand. This change prevented the employees from printing the front of checks which, as Baquet acknowledged, made their jobs more difficult and constituted an issue of dissatisfaction for the employees. Stacia Marin testified that at the 3 p.m. meeting on August 21 Baquet informed the six to eight employees present that the Employer had allocated \$40 million toward the remodeling of stores, that the Sterling store was one of the “lucky five” picked to be remodeled, that the remodel would involve new checkstands and new cash registers, a relocation of the service counter, more room in the meat department, more room in the frozen food department, and the relocation of the shopping carts. Gregory Underhill attended the 12 p.m. meeting. He testified that with regard to the remodel, Baquet mentioned many changes to the front end including a new register system, new checkstands, changes to the produce section and the meat section, but no changes to the deli. Baquet admitted that at least one of the employee meetings, employees had expressed concern about the existing cash registers and asked whether the remodel would include new cash registers. According to Baquet, he told the employees that he had already expressed their concern to the individual in charge of the remodeling, Michael Mott,

president of retail operations for Nash Finch, the Employer's parent company. Baquet informed the employees that one of the Employer's newer cash register systems permitted the employees to print the front of checks, as had been the case previously. According to Baquet, he told the employees that he was not sure what was going to happen but that Mott had been informed that the cash registers were an issue among the employees. While the record is unclear as to whether Marin and Baquet or Underhill and Baquet were testifying about the same employee meeting, I credit the testimony of Marin and Underhill as to what Baquet told the employees. I was impressed with the detail Marin provided regarding Baquet's comments and the consistency of this detail with the Employer's admitted remodeling plans, particularly the \$40 million budget figure allocated toward remodeling. Underhill likewise provided much of the same detail and his testimony was consistent with Marin's. Accordingly, I find that Baquet explicitly told the employees that new cash registers would be installed as part of the remodeling. At any rate, also find that Baquet at least implicitly promised the employees that the remodel would include new cash registers which would make their jobs less difficult. See *Lutheran Retirement Village*, 315 NLRB 103 (1994). I further find that the employees would reasonably have viewed such a change as a benefit since it would admittedly make their jobs easier. In addition, Baquet's characterization of the Sterling store as one of the "lucky five" clearly indicated to the employees that the Employer considered the remodel to be a benefit to them. I find that this would have bolstered the employees' perception in this regard.

Marin also testified that the Sterling store had suffered erosion of its customer base and that this had resulted in a significant reduction in the number of work hours available to employees. She indicated that this constituted a concern for her. Brenda Lou Grauberger, an employee, likewise testified that the reduction in work hours was a concern to her. Swigart, the Employer's store manager, testified that the purpose of a remodel was to make the store better. This would produce more sales volume which would, in turn, result in more hours for the employees. I believe that the employees would have reasonably reached this same conclusion and, therefore, would have perceived the decision to remodel as a benefit to them. As Swigart testified, the employees whom he had informed of the plans to remodel were excited about the news because of "[t]he prospect of having a nicer facility to come to work to, the prospect of more business, the prospect of more money." (Tr. 167). Accordingly, I find that the Employer's decision to remodel the store constituted a cognizable benefit to the employees.

The decision and announcement of the plan to remodel the store, with its attendant benefits to the employees, both occurred during the critical period between the filing of the petition and the election. Therefore, the inference is warranted that this conduct was coercive. Pursuant to the Board's established framework, the burden then shifts to the Employer to rebut this inference by coming forward with an explanation, other than the pending election, for the timing of its decision and announcement to remodel the Sterling store. I find that the Employer has met this burden with regard to the decision to re-

model, but has failed to meet this burden with regard to its announcement of the decision to remodel.

Michael Mott testified that he began his employment as president of retail operations for Nash Finch, the Employer's parent company, in April 2002. The evidence is undisputed that at that time Nash Finch had in place a program to increase its retail operations through the remodeling, enlargement, and replacement of certain of its current retail facilities. In addition, the program included the acquisition of other retail competitors. Virtually immediately after his hire, Mott began the task of implementing this program. He commissioned the compilation of a book detailing information on all of the existing Nash Finch stores with digital pictures and demographic data. A budget of approximately \$40 million dollars had already been allocated for capital improvements, including remodels, and Mott embarked on a journey to all of the Employer's stores to determine which would be appropriate for remodeling. According to Mott, he did not decide to remodel any store until after he had physically visited the premises. It is undisputed that Mott and other individuals involved in the remodeling decisions were scheduled to visit the Sterling store on about May 30, 2002, before the petition was filed. However, this visit was postponed because of weather problems. Eventually, Mott and the others did visit the Sterling store on July 23, 2002. It was on that day that the decision to remodel the Sterling store was made. According to Mott, the decision to remodel the Sterling store was based in part on its continued loss of market share because of the presence of a Wal-Mart store in Sterling. Also, he concluded that while the store was still profitable, it was not as profitable as it could be with capital improvements. The projected budget for the remodel of the Sterling store is approximately \$250,000 to \$325,000. Approximately 50 stores are included in the remodeling plans.

The evidence shows that although the decision to remodel the Sterling store was made during the critical period, it was part of a pre-existing plan which pre-dated the filing of the petition. The evidence also shows that the decision was based on factors related to profitability and retention of market share. Finally, the evidence shows that the decision to remodel the Sterling store involved a significant capital investment. In these circumstances, I find that the Employer has rebutted the presumption that the remodeling decision was made for the purpose of influencing the employees' vote in the election.

But while the decision to remodel may not have been made for the purpose of influencing the results of the election, the announcement of this decision is another matter. Both the Board and the courts have long recognized that an announcement of a benefit can itself be calculated to interfere with an election. See *NLRB v. Styletek*, 520 F.2d 275, 280 (1st Cir. 1975) ("Wage increases and associated benefits may well be warranted for business reasons, still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice."); *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1091-1092 (1984); *Columbian Rope Co.*, 299 NLRB 1198 (1991); *Sharing Community*, 311 NLRB 393, 395 (1993). The credible evidence here convinces me that the Employer's announcement of the remodeling decision two days

before the election and in conjunction with an anti-union speech delivered at four mandatory employee meetings was calculated to interfere with the election.

The employees were notified of the mandatory August 21 meetings by memo. This memo was issued to employees shortly before the August 21 meetings. Swigart testified that the memo informed employees that the meetings were to discuss remodeling and the union election.⁶ Thus, it is clear that Baquet's announcement of the remodeling at all four of the employee meetings was neither off-the-cuff nor coincidental. It was planned. In this regard, I note that the announcements of August 21 were made by the Employer's regional manager and that they were made on the last day that the Employer could legitimately assemble all of its employees for mandatory campaign speeches. Thus, the remodeling announcements were not only planned. They were planned to provide maximum effect on the results of the election.

Through the memo and the actual announcements at the employee meetings, the Employer established a clear nexus between the remodeling and the union election in the minds of the employees. In these circumstances, the employees would reasonably perceive that the remodeling and its attendant benefits were intended to influence the results of the election. The Employer has offered no business reason, justification or need for its actions in timing the announcement of the remodeling in conjunction with its anti-union speech presented to employees just two days before the election, and the evidence shows that none was offered to the employees at the meetings themselves. In addition, the Employer has not explained why it could not have delayed the announcement of the remodeling or pursued some alternative means of announcing the remodeling to the employees which would not have established a clear nexus between the remodeling and the election. See *Wm. T. Burnett & Co.*, supra at 1092. ("An employer's failure to show why preelection announcements of benefits could not reasonably have been delayed evidences improper motivation in such announcements."); *B & D Plastics*, 302 NLRB 245 (1991). In addition, the benefits attendant to the remodeling were to be received by virtually all of the employees. Therefore, based on all of the evidence presented and the Employer's failure to establish a legitimate reason for the timing of the announcement, I conclude that the Employer's conduct was objectionable. See *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).

While the credited testimony indicates that Baquet told the employees that the remodeling was part of a \$40 million effort and that the Sterling store was one of the "lucky five" in the region to be chosen for remodeling, I do not believe that this warrants a different conclusion. Although his statement indicated to the employees that the remodeling was more extensive than just the Sterling store, it also made clear to the employees that their store was included for the receipt of benefits by choice rather than by business necessity. As the Supreme Court

has noted: "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, supra, 375 U.S. at 409.

The Employer contends that its announcement was not objectionable because by August 21 the employees had already been informed of the decision to remodel. I find that the evidence is not sufficient to support this contention. There is no evidence to show that before August 21 the Employer ever made a general announcement to all employees about the remodeling decision. And while the evidence does show that some of the employees were informed of the decision between July 23 and August 21 the evidence does not show that all or even a significant number of the employees were informed before August 21. Thus, Swigart testified that after July 23, 2002, he talked to a lot of employees about the remodeling decision. However, he did not offer a particular time frame or an estimated number of employees and he admitted that he could not remember if he had talked to all of the employees. Moreover, Swigart specifically identified only seven unit employees whom he had told about the remodeling — the produce manager, the dairy manager, the front end manager, the pricing coordinator, the DSD-ICC clerk, the bookkeeper, and Gregory Underhill (Tr. 161-162, 164-166, 293). There is no evidence to show that employees disseminated this information generally among the workforce.⁷

More specifically, Stacia Marin testified that she first learned anything about the remodeling on the day before the employee meetings of August 21. At that time, according to Marin, another employee told her only that Mott had asked this other employee her ideas about changes to the store. Thus, there is no evidence to show that Marin was aware that a definite decision had been made to remodel the store before August 21. But the evidence does show that the August 21 announcement was the first time that Marin had heard about the remodeling decision from anyone in management.⁸ In the absence of any evidence to show that management had specifically informed Marin that a decision had been made to remodel the store, I credit her testimony that she first learned of the remodeling decision on or about August 21, 2002.

Gregory Underhill testified that he first learned of the decision to remodel the store when Swigart told him about it a couple of days before the August 21 announcement.⁹ While Underhill admitted that he was aware that Mott had visited the store on July 23 and that his visit involved remodeling, he also testified that he saw Mott's entourage taking pictures but was not sure exactly what they were for. I do not find this testimony to be inconsistent with Underhill's assertion that he first learned of the remodeling decision only two days before August 21.

⁷ Marin, Underhill and Linda Neil, a deli employee, testified that they had not heard employee discussions or rumors about remodeling between July 23 and just shortly before the meetings of August 21.

⁸ Swigart did not mention Marin as one of the employees whom he had informed of the remodeling decision.

⁹ Swigart testified that he had informed Underhill of the remodeling decision but could not recall when he told him.

⁶ The memo itself was not made a part of the record at the hearing. There is no evidence to show that the memo provided the employees with any details regarding the remodeling or that it even informed the employees that a definite decision had been made to remodel the Sterling store.

Knowing that Mott's visit involved remodeling is different from knowing that a decision to remodel the store had been made. Both Underhill and Swigart agree that Swigart informed Underhill of the remodeling decision. In view of Swigart's inability to recall when he told Underhill, I credit Underhill's testimony that he first learned of the remodeling decision just two days before the August 21 announcement.

Linda Neil, a deli employee, testified that she first learned about the remodeling when she received the memo announcing the mandatory meetings shortly before August 21. Swigart testified that he did not believe that he had personally spoken to Neil about the remodeling. Accordingly, I credit Neil's uncontradicted testimony that she first learned about the remodeling when she received the memo shortly before August 21. As noted above, there is no evidence to show that the memo provided details about the remodeling or informed the employees that a decision had already been made to remodel the store.

In sum, I find that not all of the employees were aware of the decision to remodel the store well in advance of the announcements of August 21 and that at least some of the employees were not aware of this decision until the announcements of August 21. Therefore, the evidence does not support a contention that the Employer was merely informing all of the employees of an existing benefit about which they were fully aware and which they would not reasonably connect to the results of the election. The announcement was news to at least some of the employees and it was presented to them by the Employer as a conjunct to its anti-union speech.¹⁰ In these circumstances, the employees would reasonably perceive this grant of benefit to be intended to influence the results of the election.

Even with regard to those employees who had been informed of the remodeling decision soon after July 23, the evidence shows that the August 21 announcements were objectionable. The July 23 decision to remodel was made during the critical period. As a consequence, it follows that all of Swigart's discussions with employees about the remodeling occurred during the critical period. There is no evidence to show that during these discussions Swigart informed the employees of the basis of the decision or that it was part of a preexisting plan or program begun before the filing of the petition. Thus, there is no

evidence to show that the employees were at any time disabused of the reasonable perception that the benefits of remodeling were conferred with an intent to influence the results of the election. To the contrary, the Employer reinforced this perception by reiterating its remodeling decision in conjunction with its anti-union speech to employees. In these circumstances I conclude that even those employees who had earlier been informed of the decision to remodel the store would have reasonably perceived the grant of this benefit to be intended to influence the results of the election.

Based on the above, I find that the Employer's announcement of its remodeling decision on August 21, 2002 constituted objectionable conduct. I further find that this conduct warrants the setting aside of the election. The evidence shows that the decision to remodel the store implicated certain significant employee concerns and constituted a promise to remedy those concerns. As indicated above, the remodel promised to provide the employees not only with a physically improved place to work but it also promised new equipment to make their jobs easier and an increased customer base to provide them with more work hours and more money. In addition the admitted interest that the employees expressed in the subject of remodeling through the "lots of questions" that they asked during the August 21 meetings shows that this was a significant and important subject to them and one about which they were not fully aware. Finally, as noted above, the results of the election were such that a change in only one vote could potentially affect those results. In all of these circumstances, I find that the Employer's objectionable conduct warrants the setting aside of the election.

Based on all of the above, I recommend that the Petitioner's Objection No. 4 be sustained and that the election conducted on August 23, 2002 be set aside.

Recommendations

Based upon the foregoing findings and conclusions, and upon the record as a whole . . . that the Petitioner's Objection No. 4 be sustained, and that the election of August 23, 2002 be set aside.

Dated at Denver, Colorado this 17th day of October 2002.

¹⁰ In this regard I note that the results of the election were such that a change in only one vote could potentially have affected those results.